

IP PERSPECTIVES

INTELLECTUAL PROPERTY & TECHNOLOGY LAW NEWSLETTER

1

Patents – Markush
Claiming in Canada

3

Patents – Doctrine of
Sound Prediction
Tested

Franchising in a Global
Economy

4

Internet Jurisdiction:
Reasonable
Foreseeability Required

5

Notes

Patents – Markush Claiming in Canada

A “Markush” claim recites a group of elements in the very specific form “...wherein R is selected from the group consisting of A, B, C and D.” Although Markush claims originated in the United States, their use is permitted in Canadian patent practice.

At paragraph 11.11, the Manual of Patent Office Practice (“MOPOP”) states the following about Markush claims, concisely describing their origin, form, and substantive requirements:

In chemical cases, a claim directed to a genus expressed as a group consisting of certain specified materials is allowable (Ex parte Markush 1925, 340 U.S.O.G. 839) provided it is clear from the known nature of the alternative materials or from the prior art that the materials in the group possess at least one property in common which is mainly responsible for their function in the claimed relationship. Therefore, a Markush claim will generally be construed with a generic expression covering a group of two or more different materials (elements, radicals, compounds) as illustrated in the following examples:

A solvent selected from the group consisting of alcohol, ether and acetone...

A strip of a conductive metal selected from the group consisting of copper, silver and aluminium...

Occasionally, the Markush format may be used in claims directed to subject matter in the mechanical or electrical fields in a manner such as that illustrated in the example below:

A means for attaching a wall panel to a framework wherein the attaching means is selected from the group consisting of nails, rivets and screws... (emphasis in original)

It is thought that the Markush doctrine was developed by the USPTO as an exception to the prohibition against the use of alternative language in claims. Thus, an Applicant could not use the expression “glass or plastic” but could use a generic expression such as “impervious transparent material”. The Markush expression permits the subgenus to be defined without inclusion of the offending term “or”.

The USPTO no longer objects to alternative expressions using “or” and permits expression such as “wherein R is A, B, C or D” (U.S. Manual of Patent Examining Procedure section 2173.05(h)). The practice of the Canadian Patent Office is not entirely consistent; some Examiners object to “or” and others do not. Specific guidance is not provided in the MOPOP. However, without the insistence of an Examiner, there seems to be no circumstance in which an Applicant would be obliged to use a Markush claim. A recent decision of the Federal Court of Canada, discussed below, suggests that the Markush claim form may in fact be undesirable and may foreclose certain beneficial aspects of the interpretation of a claim under the Canadian *Patent Act*.

Section 27(5) of the *Patent Act* provides:

For greater certainty, where a claim defines the subject matter of an invention in the alternative, each alternative is a separate claim for the purposes of section 2, 28.1 to 28.3 and 78.3.

Section 27(5) was enacted on October 1, 1996 and has no counterpart in previous versions of the *Patent Act*. Sections 2, 28.1 to 28.3 and 78.3 of the *Act*, which are referred to in section 27(5), concern issues of substantive patentability including, among other things, eligible subject matter, utility, novelty and unobviousness.

In the recent case of *Abbott Laboratories and Abbott Laboratories Limited v. The Minister of Health and Ratiopharm, a Division of Ratiopharm Inc.* (2005 FC 1095), the Federal Court of Canada had an opportunity to consider section 27(5) of the *Patent Act* in the context of a Markush claim.

In *Abbott*, at issue was the validity of claim 15 of Canadian Patent No. 2,261,732. This was a claim directed to a method for preparing Clarithromycin Form II and involved the treatment of an intermediate product with a solvent. The claim recited a Markush group of 17 solvents.

The Respondents alleged that five of the specified solvents could not be used in the claimed method to produce Clarithromycin Form II. *Abbott*, wishing to rely on claim 15 only in respect of a single solvent, argued that section 27(5) of the *Patent Act* allowed it to assert claims in the alternative, such that the elements of claim 15 should be interpreted as being separate claims, each specifying one of the 17 solvents. After reviewing various sources and authorities, including the MOPOP, the Federal Court concluded that section 27(5) did not apply to claim 15, stating as follows:

The key to a Markush claim is that it defines a homemade genus, all the members of which can be used interchangeably. By stating in claim 15 “a method according to Claim 2 wherein the solvent is selected from the group consisting of: acetone (...), and methanol-ethanol”, one can only conclude that any one of these solvents can be used to obtain the desired result. It is a claim to this group of solvents, it is not a claim to each of the solvents in the alternative.

I cannot accept that these listed solvents were meant as alternatives and that section 27(5) of the *Patent Act* applies. Section 27(5) of the *Patent Act* is of no help as it only applies “where a claim defines the subject matter of an invention in the alternative”. That is not the case here. By using the specific language suggested by the Commissioner and by

using the word “or” instead of “and” [NB: there is clearly an error in the judgment here, with “or” and “and” being reversed] as the penultimate word of the claim, the drafter clearly made a Markush claim and asserted that the use of all of the specified solvents would produce the desired result.

Hence, claim 15 could not be read as a plurality of separate claims, but instead encompassed the solvents shown to lack utility. It cannot be known with certainty how section 27(5) would have been applied had claim 15 used the term “or” rather than Markush terminology. It is possible that the use of alternative claim language might have saved claim 15 by invoking the application of section 27(5).

Accordingly, to the extent that use of Markush terminology is not required in the Canadian Patent Office, the *Abbott* case suggests that it may be advantageous to avoid it with a view to benefiting from section 27(5) of the *Patent Act*. The *Abbott* decision has been appealed to the Federal Court of Appeal. It is not presently known whether the appeal will touch on issues surrounding section 27(5).

Canadian patent law and practice provide great flexibility in the presentation of patent claims. There are no excess claim fees or strict limits to the number of claims that may be presented, whether in independent or dependent form. As noted above, multiple dependent claims are permitted, and a multiple dependent claim may be dependent on another multiple dependent claim. After the claim is granted, in certain circumstances a disclaimer may be filed which refutes only part of a claim. The enactment of section 27(5) of the *Patent Act* would seem to expand the opportunity for comprehensive claiming even further.

It remains to be seen whether Markush claims will ultimately be regarded as claiming alternatives or a unitary group.

David E. Schwartz, Ottawa



Kavita Ramamoorthy

Patents – Doctrine of Sound Prediction Tested

In two recent Federal Court decisions under the *Patented Medicines (Notice of Compliance) Regulations* ("Regulations") involving angiotensin converting enzyme ("ACE") inhibitors (Aventis' ALTACE (ramipril) (*Aventis v. Apotex*, 2005 FC 1283) and Pfizer's ACCUPRIL (quinapril) (*Pfizer v. Apotex*, 2005 FC 1205), the Court adopted differing analyses for the test for sound prediction. In both cases, Apotex alleged that patents were invalid on numerous grounds, including lack of sound prediction. In one case the Court concluded the test had been met, while in the other case the Court ruled there had not been a sound prediction. However, both applications for an Order of prohibition were dismissed, each for a different reason.

In this issue of *IP Perspectives* we focus on sound prediction.

The doctrine of sound prediction, as articulated by the Supreme Court of Canada in *Apotex v. Wellcome Foundation*, [2002] 4 S.C.R. 153, allows a patentee to claim subject matter not made or tested provided there was: a) a factual basis for the prediction; b) an articulable line of reasoning from which the desired result can be inferred from the factual basis and c) proper disclosure. While the general principles had been laid down, their specific application had not been considered and

a number of questions remained as to how the test would be applied, including the relevant date for assessing the soundness of the prediction.

In *Aventis*, the Court assessed sound prediction as of the Canadian filing date. In contrast, the Court in *Pfizer* used the priority date, meaning that the patentee could not rely on work performed post-priority date, but pre-filing date, to establish sound prediction. In addition, the standard for sound prediction remains uncertain given the differing findings based on arguably analogous evidence. Furthermore, the test for proper disclosure (the third element of the test for sound prediction) remains unclear, as the Court in *Aventis* adopted a high threshold holding that sufficiency of the disclosure of the patent generally and not of the prediction alone was required. The Judge in *Aventis* found that Aventis had failed on all three arms of the test for sound prediction. The Judge in *Pfizer* did not consider the three elements individually, dealing only with the broad question.

Both decisions are under appeal. It is hoped that the Court of Appeal will resolve the apparent contradictions noted above, and will clarify the application of the important doctrine of sound prediction.

Kavita Ramamoorthy, Toronto



L. Catherine Eckenswiller

Franchising in a Global Economy

It may not seem that international trade-mark licensing is a growth industry. However, one business style that is based on trade-mark licensing is booming. Franchising is experiencing rapid growth; by some accounts, up to 15% per year. As popular franchises expand into different provinces and countries, franchisors find themselves encountering a variety of different legal regimes governing business operations, consumer protection, trade-mark rights and the particulars of franchising.

A franchise is typically a contractual arrangement whereby a franchisor grants a franchisee a license to use a trade-mark in association with a business, and the franchisee undertakes to operate the business in accordance with a certain format. As well, the franchisee usually agrees to pay fees to the franchisor. Typically, a franchise agreement will be entered into by the parties that combines both commercial and intellectual property aspects. However, depending on the jurisdiction, the

franchise agreement alone may not set out all the terms governing the franchise arrangement. Two provinces in Canada, Alberta and Ontario, have passed legislation that directly governs franchise operations. This legislation establishes presale disclosure requirements whereby franchisors must provide a prescribed set of information to prospective franchisees, including financial statements and cost estimates. A failure to provide this information enables the franchisee to rescind the agreement. Franchisors from different provinces or countries who are considering expanding into Ontario or Alberta will need to be aware of the obligations imposed by this legislation.

While the remaining eight Canadian provinces do not have legislation specifically directed to franchising operations, there are a variety of different federal and provincial laws governing business practices. As well, there are judicial decisions from several different provincial courts that impose additional obligations on franchisors, including a duty to act in good faith toward franchisees.

Unlike in Canada, franchise arrangements in the United States are regulated at both the federal and state level. Fifteen U.S. states, including New York, Illinois and California, have enacted franchise legislation that mandates presale disclosure of information to prospective franchisees. Each

state's franchise laws are somewhat different. Therefore, Canadian franchisors intending to expand into the United States will need to familiarize themselves with the specific laws of the individual states where they intend to do business. They will also need to consider other state legislation governing local business practices.

In addition to state law, the U.S. Federal Trade Commission has adopted a Franchise Rule that establishes mandatory presale disclosure of information to franchisees. Given the federal nature of the Rule, it is applicable in all states and has the full force of law. The Federal Trade Commission does not require filing of franchise disclosure documents.

When expanding into any foreign country, the local laws regarding business practices must be considered. In addition to the U.S., there are several other countries that regulate the sale of franchises including Mexico, France and Australia. As well, when carrying on business in a foreign country, Canadian franchisors must be mindful of the fact that their trade-marks will be used in a different jurisdiction. Canadian trade-mark registrations are not enforceable in the other countries, and so trade-mark applications should be filed in each country where the franchisor intends to commence operations.

L. Catherine Eckenswiller, Ottawa

Internet Jurisdiction: Reasonable Foreseeability Required

In *Bangoura v. Washington Post*, a decision released on September 16, 2005, the Ontario Court of Appeal reversed a ruling by the Ontario Superior Court with respect to its jurisdiction to hear a defamation case dealing with articles that were published online by the Washington Post.

The articles, published by the Washington Post in 1997, alleged that colleagues of Mr. Bangoura at

the United Nations (where he was employed at the time) had accused him of harassment and financial improprieties. Mr. Bangoura moved to Ontario three years later, and in 2003 he commenced a lawsuit against the Washington Post claiming defamation.

In a unanimous decision, the Ontario Court of Appeal determined that the motions Judge erred



Rex M. Shoyama

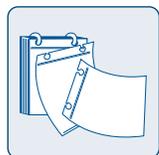
in asserting jurisdiction over the Washington Post. In finding that no “real and substantial connection” exists between the action and Ontario, the Court noted that Mr. Bangoura had no connection with Ontario until more than three years after the articles were published. Furthermore, it was not reasonably foreseeable at the time of publication, that Mr. Bangoura would become an Ontario resident. The Court expressed concern that it would be improper for a Plaintiff to be able to sue a Defendant almost anywhere in the world based upon where a Plaintiff decided to establish his or her residence, long after the commission of the act subject to complaint.

While a number of different approaches for dealing with Internet jurisdiction were briefly summarized in *Bangoura v. Washington Post*, the Court declined to endorse any single approach and left the door open for the possible use of these approaches in future cases. One can expect to see further clarification in this area of law in the

near future as Canadian courts see more of these types of cases.

Though this case specifically deals with the tort of defamation, it is also a reminder that jurisdictional issues relating to the Internet continue to increase in importance for owners and users of intellectual property. The worldwide reach of the Internet poses new challenges for Canadian courts attempting to determine the proper scope of what constitutes a “real and substantial connection” to Canada when dealing with alleged infringement of intellectual property. As the Supreme Court of Canada noted in a recent copyright case, Internet liability is “a vast field where the legal harvest is only beginning to ripen” (see *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427).

Rex M. Shoyama, Toronto



Notes

Announcements

Gaëlle Bodin has joined our Montreal office as an associate. She received her Private Law Master's Degree from the Université Paris 1 Panthéon Sorbonne in 1996 and a Law Certificate from the Université de Montréal in 1996. She was called to the Bar of Québec in 2001. Ms. Bodin's practice focuses on litigation matters relating to patents, trade-marks, and copyrights.

George B. Elvira has joined our Montréal office as a technical consultant. Dr. Elvira holds a B.Sc., an M.Sc. and a Ph.D., all in the area of Biochemistry and from the Université de Montréal. His practice focuses on patents, particularly in the areas of biotechnology and pharmaceuticals.

Daniel M. Anthony has returned after his articles to join our Ottawa office as an associate. Mr. Anthony holds a B.Sc. in Cell Biology and Genetics from the University of British Columbia and a J.D.

from the University of Toronto. He was called to the Bar of Ontario in 2005. His practice focuses on patents, trade-marks, copyright & media, litigation, licensing & IP transactions, particularly in the areas of biotechnology and pharmaceuticals.

Junyi Chen has returned after her articles to join our Toronto office as an associate. Dr. Chen holds a B.A. in Chemistry from Lawrence University, where she graduated *magna cum laude*. She received an M.Sc. and a Ph.D., both in the area of Chemistry and both from Yale University. Dr. Chen obtained her J.D. from the University of Toronto in 2004, and was called to the Bar of Ontario in 2005. Her practice focuses on patents and litigation in the areas of biotechnology, pharmaceuticals and chemicals.

Sachiko Chijiwa has returned after her articles to join our Ottawa office as an associate. Ms. Chijiwa holds an Honours B.Sc. in Chemistry and an M.Sc.

in Polymer Chemistry, both from McGill University. She obtained her J.D. from the University of Toronto and was called to the Bar of Ontario in 2005. Her practice focuses on patents, particularly in the areas of biotechnology and pharmaceuticals.

Rex M. Shoyama has returned after his articles to join our Toronto office as an associate. Mr. Shoyama holds a B.A.Sc. in Systems Design from the University of Waterloo and received his J.D. from the University of Toronto in 2004. He was called to the Bar of Ontario in 2005. His practice focuses on patents, trade-marks, and copyright and media matters, particularly in the areas of electrical/electronics innovations and software/Internet/information technology.

Brigide Mattar is on the organizing committee of the 2006 *Anges Financiers de Montreal* contest. The goal of this event is to help young entrepreneurs create or develop their own business by offering them an opportunity to present their business plans to experienced investors. Contest winners will receive grants to assist in growing their companies.

Michael D. Manson and *Franco Boltezar* are teaching the Patent Law course at the University of Victoria Law School in the fall 2005 session.

Seminars and Presentations

L. Catherine Eckenswiler participated as a panelist in a presentation entitled "International Outsourcing Agreements: Reaping the Benefits while Avoiding the Pitfalls" at the Canadian Corporate Counsel Association's Spring Meeting held in Toronto from April 17-19, 2005.

Alakananda Chatterjee gave a presentation on the topic of "Intellectual Property and Contractual Protection of Seeds and Plants" to the IP Committee of the Canadian Seed Trade Association at the Annual Meeting in Victoria, BC on July 12, 2005.

Philip D. Lapin led a workshop titled "Tips and Strategy in Opposition" and spoke on the topic of "Opposition Proceedings: Overview and Context"

at the course "Understanding Trade-marks" presented at McGill University and jointly sponsored by McGill University and the Intellectual Property Institute of Canada (IPIC) on August 12, 2005.

Brian P. Isaac spoke on the topic of Canadian advertising law, "Getting your message out there! Key branding and advertising issues for your company's U.S. and foreign markets", at a seminar hosted by Cooley Godward in Palo Alto, CA on September 22, 2005

Sanjay D. Goorachurn gave a presentation on the topic of "Contrats mettant en cause des actifs de propriété intellectuelle" at a conference titled "La négociation et la rédaction de conventions commerciales", held in Montreal on September 22, 2005.

Joy D. Morrow presented the Career Achievement Award at the Ottawa Life Sciences Achievement Awards Dinner on September 26, 2005. Smart & Biggar was a sponsor of the awards dinner.

Christian Bolduc spoke on the topic of "Patent Agent Profession" at the Université Laval in Québec City on October 7, 2005.

A. David Morrow participated in a panel on the topic of "Limitations on Exclusive IP Rights by Competition Law" at the International Association for the Protection of Intellectual Property's Canadian Annual Meeting held in Mont Tremblant, Québec on October 12, 2005.

Thuy Nguyen and *Joy D. Morrow* gave a presentation on "Developments in Biotechnology and Biochemistry" at a seminar held at the Québec Metro High Tech Park in Québec City on October 13, 2005.

A. David Morrow participated in a panel discussion on the topic of "IP Law Before the Supreme Court of Canada" at the IPIC Annual Meeting held in Mont Tremblant, Québec on October 14, 2005.

Theodore W. Sum spoke on the topic of "Legal Considerations Associated with Open Source Soft-

ware Including In-licensing and Out-licensing Issues" at the Licensing Executives Society Conference held in Phoenix, AZ from October 16-20, 2005.

Gunars A. Gaikis participated in a panel discussion on "Regulations: Key Legal and Strategic Developments Impacting Brand Names and Generics" at the Canadian Institute's Pharma Patents Conference held in Toronto from October 18-19, 2005.

Nancy P. Pei and *Yoon Kang* spoke on the topic of "New Patent Portfolio Strategies to Maximize Patent Life Cycles and Minimize the Impact of Patent Expiry and Innovation Uncertainty" at the Post-Conference Workshop of the Canadian Institute's Pharma Patents Conference held in Toronto from October 18-19, 2005.

Marc Gagnon gave a presentation in French on the topic of "How to Protect Your Innovations" at Expoplast 2005 held at Le Palais des Congrès in Montreal from October 25-26, 2005.

A. David Morrow spoke on the topic of "Patents and Biotechnology" to the clerks of the Federal Court of Canada in Ottawa on October 26, 2005.

Theodore W. Sum spoke on the topic of "Open Source Software: Business and Legal Considerations" at the IT.CAN conference held in Montreal from October 27-28, 2005.

J. Christopher Robinson will be speaking on the topic of "International Harmonization of U.S. Patent Law" at the Thomas Jefferson School of Law Patent Symposium in San Diego, CA on November 4, 2005.

L. Catherine Eckenswiller will be moderating a debate on the topic of "Should there be a Research Exemption in Canada?", to be held at the Alliance for Commercialization of Canadian Technology Annual General Meeting in Ottawa on November 8, 2005.

A. David Morrow and *Sachiko Chijiwa* co-authored a paper titled "The Interplay Between Pharmaceutical Drugs and Trade-marks", to be delivered by David Morrow at the conference titled "Recent Developments in Intellectual

Property Law" which will be presented by the Québec Bar in Montreal on November 11, 2005.

Christian Bolduc will be giving a presentation on the topic of "Technologies I – R&D Contracts" at the EDILEX course on November 24, 2005. Mr. Bolduc will also be giving a presentation at a subsequent course on the topic of "Technologies II – The Contractual Bases of Research & Development and Technology Transfer" at the Hautes Études Commercial in Montreal on November 25, 2005.

Joy D. Morrow will speak on the topic of "Teaching Old Products New Tricks – Commercial Success with New Indications" at the BioNorth Conference to be held in Ottawa from November 28-29, 2005.

L. Catherine Eckenswiller will be speaking on the topic of "Creating Enforceable Rights in Genetic Inventions" at the Commercializing Genetic Patents conference hosted by Insight Information to be held in Ottawa on December 5, 2005.

Joy D. Morrow will be giving a presentation on the topic of "Licensing Strategies and Techniques Essential for Managing the Risks and Challenges Presented by Pharma and Bio Innovation" at the Intellectual Property License Agreement conference to be held in Toronto on December 7, 2005.

Brian P. Isaac will speak on "International Law – Counterfeit Goods: How Industries Counter Counterfeits" at the Ontario Bar Association conference to be held in Toronto on January 24, 2006.

Publications

L. Catherine Eckenswiller and *Daniel Davies*, "Public Disclosures and Patentability", *Biotec-Canada Insights Magazine*, October 2005.

Michael D. Manson, "Canadian Patent Litigation", *California Business Law Practitioner*, October 2005.

Joy D. Morrow, *May Ming Lee*, and *Daphne C. Ripley*, "Biopharma Innovators Stand to Benefit From Proposed Data Protection Regulations", *Bio-Science Law Review*, Volume 7, Issue 2, March 2005.

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A. David Morrow and Christine N. Genge, "Patents of Invention", *Canadian Encyclopedic Digest*, Ontario 3rd Ed., Vol 24, Title 107 (Toronto, Carswell, October 2004).

Rex M. Shoyama, "Intelligent Agents: Authors, Makers, and Owners of Computer-Generated Works in Canadian Copyright Law", *Canadian Journal of Law & Technology*, Volume 4, Number 2, July 2005.

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